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LEGAL UPDATE

THE COMMON LORE OF SECTION 504

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For legal issues, special education personnel understandably tend to focus on the Individuals with Disabilities Education Act (IDEA), because (a) it is the primary source of their legal obligations to students with disabilities, (b) the legislation and regulations are detailed and, with the successive reauthorizations, periodically changed; and (c) the litigation is also extensive and rather fluid. However, as explained elsewhere in detail (Zirkel, in press), the relatively short and flexible legislation and regulations under Section 504 have been subject to continuing legal problems. The differences between the IDEA and Section 504 are variously subtle but potentially significant (e.g., Zirkel, 2012). Moreover, as a result of the 1990 passage of and 2008 amendments to its sister statute, the Americans with Disabilities Act (ADA), and recent litigation, Section 504 poses new legal issues for not only general education but also special education leaders. The ADA developments primarily concern so-called "§ 504-only" students, i.e., those who qualify under Section 504 but not under the IDEA. In contrast, the litigation development have primarily arisen in the context of students with IEPs under the IDEA, who—as a result of the overlapping, broader scope of Section 504, are in the "double-covered" category.

For both categories of students, school district personnel tend to have perceptions and practices that do not square well with an accurate, impartial view of Section 504. Some of these misconceptions are completely contrary to the law; others are notably—although not entirely—inaccurate; and all pose compliance issues for districts. Many of these potentially costly practice problems are based on confusion with the IDEA. Here are 18 myths about Section 504. Each one, which represents the "lore," is followed by a contrasting summary of the "law."

ESEA (e.g., Zirkel, 2006). For a less obvious example of the triggering federal financial assistance, in *Russo v. Diocese of Greensburg* (2010), the court ruled that § 504 applied to the defendant parochial school based on its participation in the national school hot lunch program and the federal E-rate program.

1. Section 504 does not apply to parochial schools.

Unlike the ADA, which has an exclusion for parochial schools (42 U.S.C. § 12187) but otherwise applies to private school regardless of funding, Section 504 applies to private, including parochial, schools that receive federal financial assistance. This financial assistance can take the form of the child find and proportional special education or related services that districts provide under the IDEA or Title I services that districts provide under the NCLB, or

2. Section 504, like the IDEA, provides federal funding and state education agency supervision/support.

Although federal financial assistance triggers Section 504, this law—unlike the IDEA—provides no federal funding; it is—like the other federal civil rights acts (and the U.S. Constitution)—an unfunded mandate. Similarly, the state has no obligation under Section 504 to provide supervision or support, although some state education agencies provide technical assistance as a voluntary matter. The administering agency, which has the authority for enforcement, is the Office for Civil Rights (OCR), which—like the Office for Special Education Programs—is part of the U.S. Department of Education.

3. Section 504 does not require an internal complaint process; the only grievance procedure is under state law, such as the one for employees under a collective bargaining agreement.

The Section 504 regulations expressly require school districts with 15 or more employees to adopt disability-related grievance procedures that "incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging [Section 504 violations]" (§104.7[b]). These disability-discrimination complaints include but not limited to student, employee, and facility issues.

4. Section 504 only provides for complaints to OCR but not a right to an impartial hearing.

The Section 504 regulations, like those under the IDEA, specifically provide for the right to an impartial hearing (§ 104.35). The states vary as to whether their IDEA hearing officers have jurisdiction for Section 504 issues, but to the extent that this forum is not available, the local school district, as the recipient of federal financial assistance, has the

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obligation to arrange for an impartial hearing upon the parent's request (Zirkel, 2012a). As a related common confusion, the Section 504 requirement for a grievance procedure is different from, and does not suffice for, the impartial hearing requirement.

5. "Child find," i.e., the legal obligation to evaluate students upon reasonably suspecting eligibility, does not apply under Section 504.

Both the regulations and the courts make sufficiently clear that child find applies for the broader definition of disability under Section 504 just as it does under the narrower scope of disability under the IDEA. The Section 504 regulations expressly trigger the evaluation obligation (§ 104.35[a]-[b]) on not only the requisite need but also when the individual is "believed to [have this] need." The regulations repeat this reasonable belief standard for the required procedural safeguards. Similarly, for example, a federal district court concluded that Section 504 imposes a child find duty upon school districts (*D.G. v. Somerset Hills School District*, 2008). More specifically, citing Third Circuit precedents, the court ruled: "In establishing a [Section 504] claim, a plaintiff must demonstrate that the defendants knew *or should have known* [italics added] about the disability" (p. 496).

6. Unlike the IDEA, Section 504 does not require consent for an initial evaluation.

Although the Section 504 regulations, being far less detailed than the IDEA regulations, do not address this issue, OCR has consistently taken the position that Section 504 requires consent for an initial evaluation (e.g., Letter to Durkheim, 1997; OCR, 2009). In contrast, neither the regulations nor OCR has been clear as to whether consent is required for services (i.e., FAPE) under Section 504.

7. Eligibility under Section 504 requires, among other things, an adverse effect on educational performance—i.e., educational need.

Unlike Section 504, the adverse impact/educational need elements are part of the IDEA eligibility criteria. In contrast, the Section 504 definition of disability—which is (a) any physical or mental impairment that (b) substantially limits (c) one or more major life activities—includes but is not at all limited to learning, extending to various other major life activities that may or many not present an educational need. As a result, OCR has repeatedly found district policies or practices that premise Section 504 eligibility solely on learning as violating Section 504 (e.g., *North Royalton School District*, 2009; *Oxnard Union High School District*, 2009).

8. For Section 504 eligibility based on suspected ADHD, the parents must provide a medical diagnosis.

This misconception contains to separate but related legal errors. First, OCR has made clear that for Section 504 eligibility, a physician is not required; other qualified professionals may provide the requisite diagnosis (e.g., *Letter to Williams*, 1994). Second, OCR has made equally clear that if the district determines that a medical or other diagnosis is necessary, the district must ensure that the child receives the diagnosis at no cost to the parents (*Letter to Veir*, 1993). Thus, for example, OCR recently found a Florida district's policy that required parents to provide documentation of a student's diagnosis as a prerequisite for an eligibility evaluation to violate Section 504 (*Broward County School District*, 2012).

9. The determination of whether the impairment (e.g., ADHD) substantially limits a major life activity (e.g., learning or concentration) is with the effects of any mitigating measures (e.g., medication) that the student is receiving.

The 2008 amendments to the ADA, which went into effect on January 1, 2009, effectively overruled the Supreme Court rulings that had interpreted Congress as intending this determination as applicable with the effects of mitigating measures. Specifically, the amendments specify that "the determination of whether an impairment substantially limits a major life activity shall be made *without* [italics added] regard to the ameliorative effects of mitigating measures" (42 U.S.C. § 12102[E][i]).

10. All students on individual health plans (IHPs) qualify instead, as a result of the ADA amendments, for a Section 504 plan.

This belief is legally inaccurate for two successive reasons. First, in its recently issued policy statement concerning the ADA amendments, OCR (2012) clarified that the key to Section 504 eligibility is the trigger for child find under Section 504, i.e., when the child has a physical or mental impairment and is reasonably suspected of needing special education or related services (Q12). Thus, only those students with IHPs who meet this standard are entitled to the requisite notice, eligibility evaluation, and—if the impairment substantially limits a major life activity—FAPE. Second, for those students who meet the eligibility criteria, a recent OCR letter of finding (*Roselle Park School District*, 2012) provided the following clarification:

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The regulation implementing Section 504 does not require that the district name the plan for providing services a 'Section 504 Plan,' or any other particular name. Thus, an IHP may meet the requirements of the regulation[s] implementing Section 504 if the District followed the procedural requirements of the regulation[s] implementing Section 504, at 34 C.F.R. § 104.34 [evaluation/placement], 104.35 [LRE], and 104.36 [procedural safeguards, including notice], in developing the IHP.

As confirmed in a synthesis of previous OCR policy interpretations and letters of findings (Zirkel, 2012b), districts should (a) screen students on IHPs to determine which ones are subject to child find; (b) implement the requisite Section 504 notice and evaluation for those students; and (c) provide the resulting eligible students with FAPE regardless of the name of the confirming document.

11. Section 504 only provides for accommodations, not either special education or related services.

Instead, the Section 504 regulations clearly entitle eligible students to "free appropriate public education" (FAPE). Unlike the IDEA, the Section 504 regulatory definition of FAPE is "special or regular education or related aids and services" (§ 104.33[a]). Thus, if a child meets the definition of disability under Section 504 and needs special education or, alone, related services, the district must provide it.

12. The determination of FAPE for a Section 504-only child is without the effects of mitigating measures.

In the same policy statement addressing current questions under the ADA amendments, OCR (2012) issued this clarification: "If, as a result of a properly conducted evaluation, the school district determines that the student does not need special education or related services, the district is not required to provide aids or services" (Q11). Thus, it appears that although the determination of Section 504 eligibility is without mitigation measures, the determination of the FAPE entitlement is with them. If, with the effects of mitigating measures, the child needs FAPE or "a reasonable modification of policies, practices, or procedures" (OCR, 2012, Q10), the district is obligated to provide it.

13. The substantive standard for FAPE under Section 504 is being reasonably calculated for educational benefit.

The cited standard applies under the IDEA. In contrast, the substantive standard under Section 504 is not clearly settled. OCR has consistently taken the position that the standard, per the definition of FAPE in the Section 504 regulations, is commensurate opportunity, i.e., meeting the individual needs of the eligible child as adequately as the district is meeting the needs of nondisabled students. However, except in extraordinary circumstances, OCR does not address substantive issues, and the courts have varied widely in student cases, including this commensurate opportunity standard (*Lyons v. Smith*, 1993), the employment standard of reasonable accommodation (which equates to the more general ADA standard of reasonable modification) (*Taylor v. Altoona Area School District*, 2010), and hybrid standards (*Mark H. v. Hamamoto*, 2010; *Molly L. v. Lower Merion School District*, 2002). In many cases, the courts do not reach this issue due to lack of sufficient evidence of intentional discrimination, typically translated as deliberate indifference to the Section 504 rights of the student (e.g., *I.A. v. Seguin Independent School District*, 2012).

14. The Section 504 regulations require districts to provide eligible students with a "504 Plan."

Unlike the IDEA regulations, which require an individualized education program (IEP) and prescribe its contents, the Section 504 regulations only provides for FAPE. The document, including its name and contents, is merely an administrative convenience for administration and enforcement (Zirkel, 2011). As the OCR letter of finding excerpted in item 9 illustrates, the regulations have various relevant requirements, including FAPE but not including a 504 Plan per se.

15. Section 504, as "IDEA lite," provides consistently less protection than the IDEA does for disciplinary changes in placement.

To some extent, Section 504 provides less protection in such disciplinary circumstances. For example, for the use of illegal drugs or alcohol, per the ADA's 1990 amendments to

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Section 504, students in the § 504-only category are subject to the same suspension/expulsion rules and procedures as nondisabled students are. However, Section 504 provides more protection than the IDEA does in at least three ways. First, as explained elsewhere (Zirkel, 2008), Section 504 does not provide the safety valve of 45-day interim alternate educational settings for the other IDEA-specified situations, such as using or possession weapons in school or causing serious bodily harm to others. Second, Section 504 requires a reevaluation upon disciplinary changes in placement (§ 104.35[a]). Third and more nuanced, consider the multiple factors for determining when cumulative days of removal within a school year constitute a pattern that amounts to a disciplinary change in placement. The most recent IDEA regulations expressly added "[conduct] substantially similar to the child's behavior in previous incidents" (§ 300.536[a][2]). In contrast to this narrowing effect, the OCR policy statements' listed factors have not expressly extended to this one (e.g., OCR, 1989). As cataloged elsewhere (Zirkel, 2007), other more nuanced differences result from OCR's relatively expansive application of Section 504 to disciplinary "removals" that are not significant changes in placement, such as exclusions from field trips.

16. School personnel are subject to liability for money damages under Section 504.

The courts have agreed that because the recipient of federal financial assistance is the district, not its personnel, the remedy of money damages—which is available under Section 504 but not the IDEA—does not apply to the individual employees (e.g., *A.M. v. New York City Department of Education*, 2012; *A.W. v. Jersey City Public Schools*, 2007). The very limited exception is the judicial interpretation, limited to the clear minority of jurisdictions, that individual employees may be liable for retaliation claims under Section 504 (e.g., *Alston v. District of Columbia*, 2008).

17. Section 504 requires that parents must participate in determinations of eligibility and FAPE or, instead, the Section 504 coordinator has the authority to make these determinations alone.

The Section 504 regulation for evaluation and placement (§ 104.35[c]) require that " a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options" make the decisions about placement," i.e., which clearly includes FAPE and inferably includes eligibility. Thus, although the district should welcome the parent's participation, unlike the IDEA, it is not legally necessary if other member of the team meet the criteria, including being sufficiently knowledgeable about the child to make these decisions. Similarly, although the Section 504 regulations require a Section 504 coordinator at the district level at least (§ 104.7[a]), this individual is clearly not necessary or sufficient to meet the three specified regulatory criteria.

18. Because Section 504 follows the child to postsecondary education and the IDEA does not, the district must change the student's IEP to a 504 plan when graduation is imminent.

Although Section 504 (or the ADA in the absence of financial federal assistance) applies to most postsecondary education institutions and the regulations specific to this educational level do not address this specific issue (§§ 104.41-104.47), this change is neither required nor advisable. First, the elimination of the IEP would seem to cause questions under the IDEA. Second, the practice of most postsecondary education institutions, because the student is typically beyond age 18, is to require the student to provide documentation of qualifying as an individual with a disability. For this purpose, an IEP would seem to be even more cogent evidence that a 504 plan.

Conclusion

Section 504 can no longer be considered a safety net or consolation prize in the wake of an IDEA non-eligibility determination. It presents confusion and complications for districts and their personnel in terms of not only 504-only, general education students but also double-covered, special education students. In short, keep current and think more than even once, twice, or thrice—i.e., 5 or 4 times—so as to engage in lawful rather than awful, lore-full practice.

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Editor's Note: The theme for the CASE Winter Hybrid Conference -- ***Evolution, Re-invention or Revolution: The Future of Special Education*** was in part inspired by the movement in Colorado discussed in this article by four pioneers in the field.